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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10
Justice

Index Number : 119226/2006
JOSEPH, FELICITA
VS.
M.D. CARISLE CONSTRUCTION CORP
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

motion to/for
No(s).
No(s).
No(s).

upon the foregoing papers, it is ordered that this motion is

Motn Seqs #'s 02 03 are consolidated for determination.

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAY 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 30 2012

J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

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Felicita Joseph, as Administratix of the Estate of Arthur L. Joseph, and Felicita Joseph, Individually,

Plaintiff,

-against-

M.D. Carlisle Construction Corp., Inc., The RC House, LLC, JD Carlisle Development Corp., Universal Builders Supply, Inc., and Quinn Construction Consulting Corp.

Defendants.

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Quinn Construction Consulting Corp.,

Third Party Plaintiff,

-against-

W&W Glass, LLC.,

Third Party Defendant.

---x

M.D. Carlisle Construction Corp., Inc., The RC House, LLC, JD Carlisle Development Corp.,

Second-Third Party Plaintiff,

-against-

W&W Glass, LLC.,

Second-Third Party Defendant.

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Decision/Order
Index No.: 119226/06
Seq. No. : 002, 003

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's n/m [3212] w/ ASF affirm, exhs.	1, 2
Def's n/m [3212] w/ RTK affirm, exhs.	3

Hon. Judith J. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action arising from a work place accident brought by Felicita Joseph, as Administratix of the Estate of Arthur Joseph ("decedent"), and Felicita Joseph, individually ("Joseph Estate" or "plaintiff"). Defendants are M.D. Carlisle Construction Corp., Inc. ("MDCC"), The RC House, LLC. ("RC House"), JD Carlisle Development Corp. ("JDCD") (collectively "MD Carlisle"), and Quinn Construction Consulting Corp. ("Quinn") (collectively "defendants"). The claims against defendant Universal Builders Supply, Inc. were discontinued on February 3, 2009. The third party defendant and second-third party defendant in this matter is W & W Glass, LLC. ("W&W").

Plaintiff claims that decedent's injuries were proximately caused by defendants' negligence and violations of Labor Law §§ 200, 240, and 241. Issue has been joined and defendants Quinn and MD Carlisle now separately seek summary judgment. W&W supports the motions for summary judgment dismissing the complaint against the defendants. Since these motions were timely brought after plaintiff filed the note of issue, they will be considered on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004). The motions are consolidated for consideration and determination in this single decision/order that follows.

Summary of the Facts and Arguments

The following facts are established or unrefuted on these motions, unless otherwise

indicated:

This case involves the fall and subsequent death of decedent from the twelfth floor of a construction project of a residential high-rise building ("project"), on September 20, 2006. At the time of the accident decedent was employed as an ornamental ironworker by W&W and involved with the installation of the exterior facade glass curtain wall panels.

The exterior of the project was to be a glass curtain wall. On the day of the accident, the decedent was working on the twelfth floor of the project, in the interior, before an opening in the facade. This opening was covered with safety cables and vertical netting ("perimeter protection"), and was awaiting the placement of a glass panel window. In order to prepare for the installation of a window, the perimeter protection had to be removed so the glass panel could be lowered into place from the exterior of the project. It was a part of decedent's job to take down the perimeter protection in preparation for the installation of the glass panel.

The opening of the facade was between 12-15 feet. In the vicinity of the openings between columns there was little space, and to perform the preparation work wearing a fixed length lanyard, decedent would need to connect at each column, remove part of the perimeter protection, and then disconnect himself from the safety strap to reach the other side.

Decedent was wearing a safety harness and fixed length lanyard ("personal protection" or "PP") at the time of his fall. The fall protection system in place when decedent was removing the perimeter protection consisted of his PP and two fixed length anchor points that were spaced further apart than the length of the lanyard. It is undisputed that it was not possible for decedent to remove the perimeter protection while

still remaining constantly connected, based upon the length of the lanyard decedent was wearing at the time of his fall.

No one else was working on the twelfth floor at the time of the accident, nor did anyone actually witness the fall as it occurred. It is undisputed, however, that decedent fell from the twelfth to the second floor, dying shortly thereafter. He was found wearing a safety harness with lanyard, but it is not clear whether he was tied off to any of the safety anchor points before the fall occurred.

MD Carlisle and Quinn each seek summary judgment dismissing the Labor Law claims on the basis that decedent was the sole proximate cause of the accident. Quinn also moves on the ground that it was not an agent of the owner (RC House) or Construction Manager (MD Carlisle) and, therefore, not liable under the Labor Laws nor any theory of negligence.

Plaintiff claims that the fall arrest system provided to decedent required that decedent disconnect his fixed length lanyard, thereby exposing decedent to a fall hazard in order to perform his work. Furthermore, plaintiff claims that the fixed length lanyards did not provide the workers with the necessary safety equipment to perform the required work and maintain proper personal protection.

Defendants argue that plaintiffs' Labor Law claim must be dismissed on the ground that decedents own actions were the sole proximate cause of his accident. It is not disputed that decedent was wearing a safety harness and lanyard at the time of loss, nor that safety anchors were available to attach his safety harness to perform the work. It is also not disputed that W&W's procedure for the installation of the glass curtain wall required the worker to tie their safety harnesses to a safety anchor point. Defendants claim

that the deposition testimony establishes that decedent was an experienced worker, familiar with the safety regulations at the construction site. Defendants argue that the deposition testimony also establishes that retractable lanyards were readily available for his use, ordinarily stored in the gang box within two or three floors of his work. Defendants further claim that the deposition testimony demonstrates that decedent chose to remove the perimeter protection, alone, and did so without using the retractable lanyards to secure his personal protection to the available anchorage points. This alleged failure to use available safety equipment, defendants claim, was the sole proximate cause of the decedent's fall and subsequent death.

Defendant Quinn also separately claims that there is no proof that shows it was negligent or owed a duty to decedent because: (1) Quinn's role at the site did not require oversight, control or supervision for the decedent, (2) nor was there an agency relationship between Quinn and the owners/developers at the project. RC House, the owner of the premises entered into a construction manager agreement with MD Carlisle. RC House also retained W&W to install a curtain wall system. Quinn, on the other hand, was hired by MD Carlisle to "act in an advisory capacity on all matter pertaining to safety and loss control at the project, and to advise the project Superintendent and the owner of any trades/subcontractors who habitually failed to comply with the project safety program requirements." (See, Quinn Exh. S and see, Quinn Exh. L, pg 81).

Therefore, Quinn claims that its role at the location was limited and did not require oversight of the means and methods of the work of the subcontractors and trades. Rather, Quinn claims that it contracted with MD Carlisle as consulting safety managers, providing three services: (1) training; (2) written safety manuals; and (3) the presence of site safety

managers to various construction companies.

Plaintiff opposes Quinn's motion, and argues that since all contractors on the project were required to obey and implement the site safety manager's orders and directives relating to the project site safety manual, the contractors actually followed orders and directives from Quinn.

Discussion

In deciding whether the defendants are entitled to the grant of summary judgment in their favor, the court considers whether they have tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Zuckerman v. City of New York , 49 N.Y. 2d 557, 562 [1980]. If met, the burden then shifts to plaintiff who must then demonstrate the existence of a triable issue of fact in order to defeat these motions. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See, Hindes v. Weisz, 303 A.D.2d 459 [2d Dept. 2003].

Defendants move for summary judgment in their favor only on plaintiff's Labor Law § 240(1) claim.[1] Generally, Labor Law § 240(1) imposes a non-delegable duty upon the

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[1] Although there is some ambiguity as to which of plaintiff's Labor Law claims the defendant's motion for summary judgment is being applied to, "sole proximate causation" is a complete defense only as applied to Labor Law § 240 (1). See, Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 39 [2004]. In distinction, the issue of plaintiff's contributory or comparative negligence, while a defense, is not a complete defense under Labor Law § 241(6) and §200. See e.g., Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 502 [n.4] [1993]; Jamison v. GSL Enterprises, Inc., 274 A.D.2d 356 [1st Dept. 2000].

owner and contractor to supply necessary security devices for workers who perform tasks at an elevation, to protect them from falling. Bland v. Manocherian, 66 N.Y.2d 452, 458-459 [1985]. However, it is well established law that not every worker who falls at a construction site is entitled to the extraordinary protections of Labor Law § 240 (1), which imposes absolute liability upon an owner and contractor, rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 [1993]; Cohen v. Memorial Sloan-Kettering Cancer Center, 50 A.D.3d 227 [1st Dept. 2008].

Sole Proximate Cause

In this particular case, there is no argument the plaintiff was not involved in an elevation related risk covered by LL § 240(1) or that safety devices were not necessary. Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675 at 681 [2007]; Rocovich v Consolidated Edison Co., 78 N.Y.2d 509, 514 [1991]; Runner v New York Stock Exch., Inc., 13 N.Y.3d 599 [2009]. Instead, defendants are claiming they provided adequate safety devices which decedent failed to utilize.

An accident alone does not establish a Labor Law § 240 (1) violation or causation. To prevail on a motion for summary judgment, defendants must establish that there was no statutory violation and that the plaintiff's own acts or omissions were the sole cause of the accident. Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 [2003]; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40 [2004]. Therefore, defendants have the burden to establish that the decedent "had adequate safety devices available; that the [worker] knew both that they were available and that he was expected to use them; that he

chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Cahill, 4 N.Y.3d at 40; see Gallagher v. New York Post, 14 N.Y.3d 83, 88 [2010]. The instant records establishes that the decedent was instructed to use a harness with lanyard; that W&W provided weekly safety meetings reiterating this rule; harnesses with both fixed length and retractable lanyards were available; that it was the established practice to put on the harness and lanyard first thing in the morning; and that the decedent was familiar with the harness and lanyard protocol and even reminded other co-workers to put them on and use them.

Here, the parties do not dispute that decedent was wearing a safety harness and lanyard at the time of loss, nor do they dispute that there were available safety anchors in the work area. Defendants claim that retractable harnesses were available for decedent's use, ordinarily stored in the gang box within two or three floors of his work. Defendants further argue, that based on deposition testimony, decedent, an experienced and safe worker, chose to remove the cable and vertical safety netting in front of an open area, alone, and did so without securing his safety harness to the available anchorage points which he could have done is he used the available retractable lanyards. Thus, defendants claim that decedent's fall was the sole result of decedent's failure to use available safety equipment. In support of their contentions, and in addition to deposition transcripts, defendants proffer the affidavit of their expert, Jim Lapping ("Lapping")[2], who asserted that

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[2] The courts notes plaintiff's argument that defendants' expert affidavit from Lapping should be precluded and is denied, as there is no evidence that any delay in making expert disclosure was intentional or wilful. Hernandez-Vega v Zwanger-Pesiri Radiology Group, 39 A.D.3d 710, 711 [2d Dept 2007] [holding that CPLR 3101(d)(1)(i) does not "mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" [internal

decedent caused the accident because (1) decedent was working alone and (2) he did not use a retractable length lanyard, but a fixed length lanyard instead.

Plaintiff argues in opposition that Lapping does not discuss or dispute what plaintiff had identified as the gap in fall protection for workers who did not have retractable lanyards, as identified by plaintiffs expert, Thomas Cocchiola, P.E. This gap in fall protection would require a lone worker taking down the netting to detach his fixed length lanyard from one safety strap and then walk over to another to reattach. Plaintiffs claim that this gap between safety straps created the gap in fall protection, particularly when the fixed length lanyards were not long enough to reach the entire length of the netting protecting the open facade of the building.

The testimony of John Edge ("Edge"), the shop safety steward for W&W, and of Leslie Young ("Young"), project manager of W&W, raise issues of material fact sufficient to defeat the defendants motions for summary judgment.

Edge testified that the workers of W&W were never instructed that there was a preference for retractable lanyards over fixed lanyards, just that the men "hook up." Edge further testified that he approximated that there were four retractable lanyards available at the work site, and that he had requisitioned more, he did not instruct decedent to use a retractable lanyard, nor was there a preference that the workers use one type of lanyards versus another.

Young testified that W&W provided its workers with all safety harnesses and lanyards associated with fall protection for its employees. The onsite foreman, a Mr. Lopez, was responsible for directing and supervising the decedent on the projects. The

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quotation marks and citations omitted].

foreman would provide the harness and lanyards to the workers when materials were provided on the site. Young also testified that W&W did not have a policy against men working alone. Young further testified that workers could perform tasks in preparation for the placement of curtain wall panels by themselves. Finally, Young testified that there was no problem with decedent following company policy.

The testimony of Edge and Young established that although there may have been four retractable lanyards available at the work site, there were 20 W&W employees included in the erection gang. Therefore, it is not clear that a retractable lanyard was made available to decedent, nor is it clear that decedent was ever instructed to use a retractable lanyard. The harness and lanyard that decedent had at the time of the accident was provided to him by his employer and was acceptable to that employer despite the gap in protection that it created. This information is specific and sufficient to raise issues of fact on the issue of sole proximate cause. See Collado v. City of New York, 72 A.D.3d 458 [1st Dept. 2010]. Furthermore, both witnesses from W&W testified that there was no policy against men working alone to perform the type of preparation work that decedent was performing at the time of the accident. Thus, decedent's conduct, at this stage, is not, as a matter of law, the sole proximate cause under section 240(1) of the Labor Law. No summary judgment in favor of defendants is available on this basis.

Agency

Quinn separately claims that it has established its entitlement to judgment, as a matter of law, because it was not an "owner, "contractor," or "agent" of the owner or general contractor at the time of decedent's accident. In opposition, plaintiff failed to raise a triable issue of fact.

A construction manager is not generally considered a contractor responsible for the safety of the workers at a construction site under the Labor Law, unless it has been delegated the authority and duties of a general contractor or if it functions as an agent of the owner of the premises. Walls v. Turner Constr. Co., 4 N.Y.3d 861 [2005]. Only upon obtaining the authority to supervise and control does an entity fall within the class of those having non-delegable liability as an "agent" under Labor Law § 240(1). Russin v. Picciano & Son, 54 N.Y.2d 311 [1981]; Walls v. Turner Constr. Co., 4 N.Y.3d 861 [2005]. In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition." Damiani v. Federated Department Stores, Inc., 23 A.D.3d 329 [2d Dept. 2005] [internal citations omitted]. Thus, liability is dependent upon the amount of control or supervision exercised over the plaintiff's work.

The First Department has consistently held that

> "a construction manager whose duties [are] limited to observing the work and reporting to the contractor safety violations by the employees does not thereby become liable to the contractor's employee when the latter is injured by a dangerous condition arising from the contractor's negligent methods. The construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees. The general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations. By the same token, "the fact that [the owner] may have dispatched persons to observe the progress and method of the work does not render it actively negligent." Buccini v. 1568 Broadway Assoc., 250 AD2d 466, 468-69 [1st Dept. 1998] [internal quotations and citations omitted].

While Quinn provided the site safety manager for the worksite, the site safety manager did not have the authority to stop the work if he observed an unsafe condition, nor did he have the authority to shut down the site or fire employees who did not follow the safety procedures. According to Quinn, if there was an unsafe condition observed at the project, the site safety manager would notify the responsible parties who may have created such unsafe conditions. Specifically, John Murphy ("Murphy"), Quinn's Vice President, testified at his deposition that Quinn only coordinated the schedule of the renovation project and performed contract document review, estimating, value engineering, logistics, bid solicitation, and work scope analysis. Murphy further stated that Quinn had no involvement in the actual work on the construction project and, in particular, the decedent's work was overseen and directed only by his employer, W&W. No evidence to the contrary was presented. Since Quinn did not have authority to direct and supervise the decedent in his work, Quinn did not have the type of responsibility at the worksite that would be sufficient to impose liability. See Doherty v. City of New York, 16 A.D.3d 124 [1st Dept. 2005].

Therefore, Quinn has established its entitlement to judgment as a matter of law, that it is not liable to plaintiff, under the Labor Laws nor any theory of negligence, because it was not an "owner, "contractor," or "agent" of the owner or general contractor at the time of decedent's accident. Accordingly, Quinn's motion to dismiss the complaint against it is granted.

Quinn also asks that all claims and cross-claims against it be dismissed on the same basis. MD Carlisle, which has asserted a cross-claim against Quinn, raises no argument in opposition on this issue. W&W, which has asserted a counterclaim against

Quinn, likewise raises no argument regarding why the counterclaim should survive dismissal on this basis. The cross-claim and counterclaim are therefore, dismissed.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant Quinn Construction Consulting Corp.'s motion for summary judgment is granted to the extent that the complaint against it is dismissed and all claims and cross-claims, including counterclaims are also dismissed; and it is further

ORDERED that defendants M.D. Carlisle Construction Corp., Inc., The RC House, LLC., and JD Carlisle Development Corp.'s motion for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that this case is ready for trial. Plaintiff shall serve a copy of this decision/order on the office of Trial Support so that the case can be scheduled; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 30, 2012

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.